United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

To be argued by
PATRICK M. WALL
and
VICTOR J. HERWITZ

B
P/S

75-1269

United States Court of Appeals

For the Second Circuit

Docket No. 75-1269

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN McCLEAN, RAMON VIERA and EDWARD CODELIA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

No. 75-1269

- against -

JOHN McCLEAN, RAMON VIERA
and EDWARD CODELIA,

Appellants.

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BRIEF FOR APPELLANTS

Preliminary Statement

This is an appeal from judgments entered on June 12, 1975, in the United States District Court for the Eastern District of New York after a jury trial before Hon. Jack B. Weinstein, convicting all Appellants of one violation of 18 U.S.C. §241, and three violations of 18 U.S.C. §242, and further convicting Appellants McClean and Codelia of two violations and Appellant Viera of one violation of 18 U.S.C. §2511(1)(a). Each was sentenced to consecutive one-year terms on the four misdemeanors and a consecutive five-year sentence for wiretapping. Noting that the sentence was "harsh," the court added a $10,000 fine to the nine years each had received.

Statement of Facts[1]

The facts of this case which are pertinent to the issues raised on this appeal may be briefly set forth as follows:

I The Government's Theory of Appellants' Guilt

Before detailing the Government's proof, we deem it helpful to set forth, in the broadest of outline, the alleged conduct which forms the basis of Appellants' convictions.

It was the Government's theory that, from 1969 through 1971, while members of the Special Investigations Unit (hereafter "S.I.U.") of the New York City Police Department (a squad devoting its attention to major narcotic violations), Appellants illegally wiretapped certain suspects and, when apprehending those suspects and others, extorted from them large sums of money which they kept for themselves and others in S.I.U., rather than vouchering with the Police Department (hereafter "Department").

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1. Unless otherwise noted, parenthetical references herein preceded by the letter "A" are to the Appellants' Appendix; those preceded by "T" are to the trial transcript. Where appropriate, the name of the witness to whose testimony reference is being made will precede the page reference.

These allegations were those upon which Appellants were ultimately convicted. The wiretapping theory remained the same throughout Appellants' travail. The federal handle which the Government attached to their alleged taking of money, however, dramatically changed, as we shall point out below.

II The First Indictment

On March 8, 1974, Appellants, together with one John Egan and one Leslie Wolff, were indicted in a four-count indictment in the Eastern District (74 Cr. 180) for the following crimes:

Count One: Conspiring to defraud the appropriate agencies of the Government of their right to investigate violations of federal narcotic laws by failing to advise such agencies of such offenses known to them, by comforting and assisting those who had committed such offenses, and by other similar means, all in violation of 18 U.S.C. §§3 and 1510 and 21 U.S.C. §§173 and 174.

Count Two: Comforting and assisting, on November 19, 1970, federal narcotic law violators named Nicodemus Olate [Romero] and Justo Quintanilla, and preventing their apprehension, trial and punishment, by failing to turn in

to the appropriate Governmental agencies money seized from those persons, which constituted evidence of federal drug violations, all in violation of 18 U.S.C. §3 and 21 U.S.C. §§173 and 174.

Count Three: Obstructing by bribery, misrepresentation, force and other means, on that same date, the communication to appropriate Governmental agencies, of information relating to those offenders' violations of 21 U.S.C. §§173 and 174, in violation of 18 U.S.C. §§2 and 1510.

Count Four: Violating 18 U.S.C. §2511(1)(a), from October 31 to November 30, 1970, by installing an illegal wiretap on a telephone located at an address in Queens County — the address where Romero and Quintanilla were located. Appellants were arraigned on this indictment and pleaded not guilty. On May 6, before pre-trial motions were decided, the Government sought and obtained an order dismissing the indictment.

III The Present Indictment

On November 22, 1974 — more than eight months after the first indictment had been filed and more than

six months after it had been dismissed — the present seven-count indictment (74 Cr. 729) was filed against Appellants. It charged the following crimes:

Count One: Conspiring to violate the civil rights of various citizens and residents of the United States by depriving them of liberty and property without due process of law, in violation of 18 U.S.C. §§241 and 371.[2]

Count Two: Violating, on November 19 and 20, 1970, the civil rights of Romero, Quintanilla and one Elba Guzman not to be deprived of property without due process of law by taking approximately $81,000 from them under color of law, in violation of 18 U.S.C. §242.[3]

Count Three: Violating, on October 27, 1971, the civil right of one Ernest Solomon not to be deprived of property without due process of law by taking approximately $6,000 from him under color of law, in violation of 18 U.S.C. §242.

Count Four: Violating, on November 12, 1971, the civil right of one Vito Mirabile not to be deprived of

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2. This count was the equivalent of Count One in the first indictment, which charged, in effect, a conspiracy to obstruct justice by seizing money from federal drug law violators and failing to turn that money over to federal law-enforcement officers as evidence of those violations.

3. This count was based upon the same factual allegations as were Counts Two and Three of the first indictment.

property without due process of law by taking approximately $10,000 from him under color of law, in violation of 18 U.S.C. §242.

Count Five: Violating 18 U.S.C. §2511(1)(a) from October 31 to November 20, by installing an illegal wiretap on a telephone located at an address in Queens County — the address where Romero, Quintanilla and Guzman were located.[4]

Count Six: Violating 18 U.S.C. §2511(1)(a) from November 1 to 13, 1971, by installing an illegal wiretap on a telephone located at an address in Queens County — the address where one John Grimke was located.[5]

Count Seven: Violating 18 U.S.C. §2511(1)(a) from November 17 to December 2, 1971, by installing an illegal wiretap on a telephone located at an address in Kings County.[6]

IV The Testimony at Trial

Although the defense introduced evidence by way of stipulation, the testimony received at trial was presented by the Government. Culling the record and placing that evidence in chronological order, we state that it consisted of

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4. With the exception of a shorter date for the offense, this count, which was related to Count Two, charged the same offense as Count Four of the first indictment.

5. Grimke was a narcotic accomplice of Vito Mirabile, and thus this count is related to Count Four.

6. Appellant Viera was not named as a defendant in this count.

testimony dealing with: (A) the nature and purpose of the Police Department's S.I.U. squad; (B) the alleged genesis of the conspiracy charged, and certain acts evidencing it; (C) the Calvo matter; (D) the Romero matter; (E) the Solomon matter; (F) the Grimke-Mirabile matter; and (G) the Sparza-Lindquist matter.

A. The S.I.U.: Its Nature and Purpose

The S.I.U. was a specially-created unit, the function of which was to identify, investigate and arrest major narcotic violators operating in the City of New York. Those selected by the Department for service on it were generally deemed to be among the most able and experienced officers in the ranks.

The personnel of the unit were divided into three-man teams,[7] with an occasional fourth man added.[8] Each team had a member who would unofficially be designated the "team leader" because of his expertise or experience.[9] A group of

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7. McClean, Viera and Codelia formed such a team during most of the period covered by the indictment.

8. Patrolman Luis Martinez, an important Government witness, had for a time been a fourth member of the McClean - Viera - Codelia team. He had pleaded guilty to an income tax charge in the Southern District of New York and, at the time of trial, was serving a six-month sentence for that offense.

9. McClean was deemed to be the "team leader" of the McClean - Viera - Codelia team.

teams, each usually acting independently of the others, would be supervised by a single sergeant who, although occasionally working "in the field," would usually remain in and about S.I.U. headquarters.[10] The immediate superior of a number of sergeants would be a lieutenant.[11] The chief of the unit would generally be a captain.[12]

B. The Genesis of the Alleged Conspiracy and Certain Acts Evidencing It

1. Captain Tange Meets With Sergeant Horgan

In the late spring of 1969, while commanding officer of S.I.U., Captain Daniel Tange met with a sergeant in S.I.U. named Jack Horgan, and told him that he wanted to be "included in" on any illegal money that might be made

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10. The sergeant immediately supervising the McClean - Viera - Codelia team was Gabriel Stefania. Like Martinez, he was an important Government witness who had pleaded guilty to an income tax charge in the Southern District and who, at the time of trial, was serving a six-month sentence. To induce his cooperation, state officials had arranged to save his police pension, likely to amount to hundreds of thousands of dollars.

11. The lieutenant in this case was John Egan, who was named as a defendant in the first indictment but only an unindicted co-conspirator in the instant one.

12. During a portion of the period covered by the indictment, the head of S.I.U. was Captain Daniel Tange, who was also an important Government witness. Although admitting wrongdoing, Tange was never prosecuted. Like Stefania, he had made an arrangement with the Police Department whereby his pension had been saved.

by the unit (Tange — T1379-80). Horgan told him that he was glad that Tange had finally changed his mind, and said he would put out the word for him (T1380). Horgan shortly thereafter got back to him and told him that he had spoken to some of the sergeants and other members of the unit and felt that there would be no problem (Tange — T1380).

2. Tange's Meeting with McClean

A few weeks later, Tange met McClean at "The Pub," a restaurant across the street from the District Attorney's office in Queens County (T1374). Tange asked to be included as an equal partner in any illegal money to be made by the McClean team,[13] and McClean, who said Horgan had spoken to him, agreed, stating that his team was very careful and did not make a lot of "scores," looking only for an occasional one and not looking to make a lot of money (Tange — T1374). During the conversation, McClean placed in Tange's pocket an envelope containing $1,000 (Tange — T1374-75).

3. Tange's Restaurant Meeting with Codelia and Others

After the meeting with McClean, Tange met at a

13. Codelia was not yet a member of that team.

restaurant with S.I.U. members including Sergeant Horgan and Detectives Weiss, Falk and Codelia (Tange — T1384). Tange's desire to share any illegal money made by S.I.U. members was discussed,and Codelia did not say anything (Tange — T1386). After the conversation, Weiss gave Tange an envelope containing $1,000 (Tange — T1387).

4. Codelia's Payments to Tange

Later that summer, Tange was sent to the F.B.I. National Academy in Washington. While there, he received a call from Codelia and Detective Falk that they wanted to meet him at the airport. He met them there and one of them gave him either $500 or $1,000, which they said had come from a case they were involved with (Tange — T1388).[14]

After his return to New York and his assignment to the Police Academy rather than S.I.U., Codelia and Falk met Tange in the Bronx and again gave him either $500 or $1,000, saying that it was a further sum from the same case (Tange — T1389).[15]

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14. Codelia, at this time, was not yet a member of the McClean - Viera team.

15. Codelia was still not yet a member of that team at the time of this alleged payment.

C. The Calvo Matter[16]

On October 17, 1969, drug-dealer Joseph Calvo and his girlfriend Betty Ann Bryant were arrested in their Brooklyn apartment by an S.I.U. team which included McClean and Viera (Calvo — T1332-36).[17] The officers searched the house and seized approximately $20,000, which was lying on the floor when they arrived (Calvo — T1334-36). Calvo and Bryant were taken to the Kings County District Attorney's Office, where Bryant overheard McClean and Viera talk to Calvo. They told him that if he were to sign a receipt for $320, they would give him back his jewelry (worth more than $3,000) and the keys to his cars (a Mark IV and a Continental); otherwise, he would not get them back (Calvo — T1336-38). Calvo signed the receipt (Calvo — T1337)

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16. The sole Government witness who testified about this incident was Betty Ann Calvo, widow of Joseph Calvo, who had married Calvo during the month following this incident (Calvo — T1333). She admitted that the Assistant United States Attorney who called her had promised to "look into" the problems she was having on obtaining the return of $10,000 in bail money which she had put up in connection with her husband's state case (Calvo — T1342). One of her attorneys in the matter about which she testified had been Robert Lazarus, Esq., who represented Viera at the trial below. The issue raised by that fact is dealt with in Point Seven infra at 53.

17. Codelia, not yet a member of the McClean - Viera team, was in no way connected with this arrest.

D. The Romero Matter

1. The Wiretap (Count Five)

Sometime in November of 1970, Paul Stern, who was superintendent of an apartment building located at 6515 - 38th Avenue in Woodside, Queens, noticed two strange men in the lobby of the building (Stern — T897-99). The men identified themselves as police officers, and said they were watching for someone who lived in the building who was dealing in drugs (Stern — T900, 903). The next day, he met two more (Stern — T900).[18] To cooperate with their investigation, he made available to them a ground-floor room which they thereafter used as their base of operation (Stern — T904).[19]

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18. Stern identified the appellants and one Detective Joseph Nunziata as the four officers, but conceded that he could not be positive as to his identification of any of them (Stern — T51). With that reservation, we will describe his testimony and identify the appellants by name, even though Stern said merely that they "resembled" the officers with whom he dealt (Stern — T51). He first made an identification of appellants and Nunziata by photograph some three years after the event, and said at that time that he was not sure (Stern — T47-48).

19. He later learned that they were interested in Apartment 6-Z, leased by one Luis Martinez (Stern — T903). This tenant is not to be confused with another Luis Martinez, the Government witness who was an S.I.U. patrolman, assigned for a time to the McClean - Viera - Codelia team, and who was in no way involved with the Romero matter.

From time to time, Stern would visit that room to see what the officers were doing.[20] He noticed that they had a tape recorder there, and once noticed Codelia listening to a tape containing a conversation in Spanish; Codelia told him of the automatic features of the recorder, which ran only while the phone was off its hook (Stern — T905, 911-12).[21] On another occasion, he accompanied McClean into Apartment 6-Z, where they noticed about $500 and a gun, and then left (Stern — T913).

2. The Civil Rights Violation (Count Two)

Nicodemus Olate Romero, a 49-year-old citizen of Chile, was a drug dealer of major proportions (Romero — T947-50). At the time of his testimony, he was serving an eight-year sentence imposed upon him by Judge Weinstein (Romero — T949), and had pending before that judge a motion for a reduction of the sentence.

In September of 1970, Romero and one of his drug-dealing friends, Justo Q[illegible]ntanilla, had been arrested on drug charges by S.I.U. members in Manhattan (Romero — T951-52). He made bail of $30,000 in October, and arranged

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20. Stern had no recollection of ever having seen Viera in the room when recording equipment was there (T909).

21. The tape recorder had wires coming from it which were attached to the telephone box (Stern — T908).

to have Quintanilla bailed out the next day (Romero — T1019). He thereupon continued his drug operations with his wife, one Elba Guzman, and Quintanilla (Romero — T956). He noticed, however, that the officers who had arrested him in September were still following him (Romero — T960), so he arranged to stay for a while at the apartment of a fellow-Chilean, Luis Martinez, who occupied Apartment 6-Z at 6515 38th Avenue in Woodside, Queens (Romero — T960-61). He moved into 6-Z on November 17 or 18 (Romero — T961).

On about November 17, Martinez, who was changing bills for Romero even after he knew the latter was dealing in drugs (Martinez — T1291-93), visited 6-Z and got from Romero an additional amount to change (Martinez — T1295). He left the apartment and, spotting a man outside of whom he was apparently suspicious, went back upstairs and returned the money to Romero (Martinez — T1296). He then left the building with a shopping bag containing a suit and, having returned to his other apartment in Manhattan, was stopped by McClean and Viera (the man who had aroused his suspicions in Queens) and a third person, whom he could not identify; they searched his shopping bag and left (Martinez — T1296-1299). The next day, Romero brought him $5,000 for purposes of changing (Martinez — T1299).

Romero and Guzman spent most of November 19 visiting various banks in mid-town Manhattan, exchanging small denominations of money obtained in the drug trade for larger bills suitable for transport on their soon-intended trip to Chile, and brought the money back to Apartment 6-Z (Romero — T963-65).[22] Sometime between 5:00 and 7:00 p.m., Guzman and Quintanilla left the apartment to shop and, about ten minutes later, Romero heard a knock on the door and, when he answered it, McClean, Codelia and Detective Leslie Wolff entered, with guns drawn (Romero — T967-69).[23] A few minutes later, Viera and Lieutenant Egan entered with Guzman and Quintanilla, the latter two in handcuffs (Romero — T968-70). The officers searched the apartment, finding $21,000 and the keys to the Romero bank vault (Romero — T973-74). Codelia, who acted as interpreter, told Romero they knew he had $90,000 in the bank and Romero asked how much money they wanted for his freedom, being told that they wanted $60,000 more than the $21,000 already sezied (Romero — T975-77).

Codelia then told Romero that the "Chief" (i.e., Egan) had said that Quintanilla had to be arrested and gave

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22. Although the banks they visited were within a block or so of the bank in which they shared a safety-deposit box in Guzman's name, they neglected to place their money in that box.

23. Wolff, an S.I.U. member, was a named defendant in the first indictment but merely an unindicted co-conspirator in the instant one.

Quintanilla certain identification papers, telling him to appear in court as one Jorge Santander from Ponce, Puerto Rico (Romero — T977-79).[24] Romero and Quintanilla agreed that the latter should be arrested, and he left with Codelia, Viera and Egan; McClean and Wolff stayed with Romero and Guzman throughout the night (Romero — T979-81).

At about 5:00 a.m. on November 20, Viera and Codelia returned to Apartment 6-Z and, together with McClean and Wolff, they drove Romero and Guzman first to the business address of the Romero's friend Luis Martinez, to pick up $5,000 which the latter was holding for Romero,[25] and then to the bank where the Romeros had their safety-deposit box, to obtain the $60,000 which the officers had been promised the previous night (Romero — T984-87). Guzman entered the bank and returned to the car, where Romero, receiving $68,000 from Guzman, gave $60,000 of it to the officers (Romero — T987-89).

The next stop was the Criminal Court Building in

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24. New York Code of Criminal Procedure §552-a, in effect at the time, required that all persons such as Quintanilla be fingerprinted before they could be released on bail. According to Romero, the officers knew that Quintanilla had been arrested in September with Romero for another printable drug offense (Romero — T978). According to Patrolman Martinez, every police officer in New York City must know that the fingerprints taken would necessarily reveal that prior arrest and the name then used (Martinez — T437-38), and thus the advice supposedly given Quintanilla by Codelia made no sense whatsoever.

25. The previous day, Martinez had agreed to attempt to change it for Romero into larger bills.

Queens County, where Quintanilla was arraigned on a drug charge and then bailed out by Romero (Romero — T989).[26] After the court proceedings, McClean told Romero that he, Guzman and Quintanilla should immediately leave the country (Romero — T990). Shortly thereafter, they did.

E. The Solomon Matter

1. The Wiretap

The Solomon wiretap was concededly a legal one, and thus there was no count dealing with it.

2. The Civil Rights Violation (Count Three)

On October 28, 1971, after an investigation which included surveillance and a court-authorized wiretap, search warrants were executed at various Brooklyn apartments and a number of arrests were made (Martinez — T165-66). Among the arrested was one Ernest Solomon, whose apartment at 91 Ocean Parkway in Brooklyn was also the subject of a search warrant (Martinez — T166-67). Solomon was taken to

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26. The official court record of that arraignment, entitled People v. Jorge Santander (Defendants' Exhibit O), shows that although Quintanilla posed as Santander from Puerto Rico, the court knew somehow that he was from Chile. We submit that he knew that fact solely by virtue of the information shown by Quintanilla's fingerprint record. See footnote 24, supra.

his apartment by McClean, Viera, Codelia, Martinez and Stefania (Martinez — T168-69; Stefania — T659). The place was searched and McClean and Viera found an attache case containing money (Martinez — T169-70; Stefania — T661). Stefania, McClean and Viera then had a conversation with Solomon, as a result of which it was decided that about $1,000 would be returned to Solomon, approximately $4,000 would be vouchered with the Department as evidence and the balance would be divided among the arresting officers (Stefania — T662-65).

Solomon was taken to the Kings County District Attorney's office for processing on his arrest and, while there, McClean gave Martinez $500 and Stefania a similar amount (Martinez — T185; Stefania — T665). The sum of $4,125 was vouchered with the Department (Martinez — T186).

F. The Grimke-Mirabile Matter

1. The Wiretap (Count Six)[27]

In early November of 1971, McClean, Viera, Codelia

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27. Count Six of the indictment charged all three appellants with a violation of 18 U.S.C. §2511(1)(a), in that they installed an illegal wiretap on the phone of one John Grimke, a narcotic suspect living in Queens County. The jury acquitted all three on this count, but we nevertheless set forth the evidence offered by the Government in its effort to convict.

and Martinez discussed an investigation they were working on involving one John Grimke, a resident of Queens County, and one Vito Mirabile, a resident of Nassau County. It was decided that a wiretap should be installed on Grimke's telephone and shortly thereafter Martinez and Codelia installed one, placing the necessary equipment in the basement of the apartment building in which Grimke lived (Martinez — T189-200). From time to time during the next week or so, various members of the team would monitor the tapes and get information from them (Martinez — T203-04, 209).

2. The Civil Rights Violation (Count Four)

Using the information gained from the wiretap but claiming that it was obtained from a confidential informant, Martinez filed an affidavit in a state court in Queens County, seeking the issuance of search warrants for Grimke's apartment and Mirabile's home; the warrants were issued on November 13 (Martinez — T211-12).[28]

That same day, McClean, Viera, Codelia, Martinez and Stefania executed the warrant on Grimke's apartment in Queens, found incriminating evidence and arrested Grimke

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28. Martinez claimed at trial that he had no confidential informant and that the affidavit in support of the request for the warrants was actually prepared by McClean (T211-12).

and his wife (Martinez — T214-15; Stefania — T677). Both were then taken by car under guard to Mirabile's residence in Nassau County (Martinez — T215; Stefania — T677).

In Nassau, the search warrant was executed and both money and narcotics were found in the trunk of Mirabile's car; the money consisted of approximately twenty packets, each apparently containing approximately $1,000 (Martinez — T218; Stefania — T682). Stefania told Mirabile that the money was going to be seized but when the latter protested that his wife would need money for household expenses and the like, Stefania, McClean and Viera gave him back one packet of the money for that purpose, deciding that they would keep five packets, one each for themselves, Codelia and Martinez (Stefania — T681-82). Mirabile was then taken for booking to the Nassau County Police Department where the S.I.U. members were erroneously told that, since the search warrant had been issued in Queens County, the court proceedings would have to take place there (Martinez — T229).

Back in Queens County, Mirabile was lodged in a detention pen for safekeeping until his arraignment and $9,485 of the money seized from him was vouchered with the Department as evidence (Stefania — T683). Later, on

their respective ways home, Martinez and Codelia, in the latter's car met the other three officers in McClean's, and McClean threw money into Codelia's car; Martinez's share of the thrown money was $500, while Stefania, in McClean's car with Viera, got about $1,000 (Martinez — T236-37; Stefania — T688-89).

G. The Sparza-Lindquist Matter

1. The Wiretap (Count Seven)[29]

In mid-November of 1971, the McClean - Viera - Codelia team received information that a large-scale drug operation was being conducted at an apartment on Ocean Parkway in Brooklyn by one Sparza and one Carol Lindquist: a request was thereafter put through Departmental channels for a court-authorized wiretap (Martinez — T251). McClean, Codelia and Martinez then installed wiretap equipment at a nearby building, on "pairs" of the suspected phone (Martinez — T257-59). From time to time in the next few days, Martinez, McClean and Codelia would monitor the tapes which had been made (Martinez — T262).

On December 2, representatives of the New York

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29. As noted supra at note 6, Viera was not named as a defendant in this count.

Telephone Company found wiretapping equipment in the basement of the building where Martinez had testified it had been placed connected to the wires of a phone leased to one Carol Lindquist (Posch — T559-64). Shortly thereafter, Codelia phoned Martinez and warned him to stay away from the building, since the Kings County District Attorney's Office had seized the wiretap equipment (Martinez — T271-72). The next day, McClean, Viera, Codelia and Martinez were summoned to the District Attorney's Office and, after conferring with a prosecutor, McClean told the others that there was nothing for them to worry about (Martinez — T272-73).

2. The Civil Rights Violation

No violation of 18 U.S.C. §242 was charged with respect to the Sparza-Lindquist matter, and there was no attempt by the Government to show that any had occurred.

POINT ONE

THE EVIDENCE UNDER COUNTS ONE THROUGH FOUR WAS INSUFFICIENT AS A MATTER OF LAW SINCE THE STATUTES UNDER WHICH THOSE COUNTS WERE OSTENSIBLY DRAWN WERE NOT DESIGNED TO COVER ACTS, CRIMINAL UNDER STATE LAW, WHICH INCIDENTALLY DEPRIVED PERSONS OF THEIR FEDERAL RIGHTS

I INTRODUCTION

Giving the Government the best of it, as we must by virtue of the jury's verdict on the first four counts,[30] Appellants were shown to have agreed among themselves and with others to take sums of money from not-yet-known and not-yet-apprehended drug dealers, when the occasion to do so seemed propitious, and, pursuant to that agreement, occasionally took for their own use from such "victims" various sums of money. We submit, however, that such evidence was insufficient to sustain their convictions either under the conspiracy count or the three related substantive counts.

II ARGUMENT

A. Sufficiency Under the Conspiracy Count

Our argument with respect to the sufficiency of

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30. That verdict, however, had to have been affected by the trial court's erroneous charge with respect to those counts. See Point Three, infra.

the Government's proof under Count One is made more complex than it ought to be by the strange history of that count. Ostensibly drawn under both 18 U.S.C. §§241 and 371, it existed throughout the trial as having been drawn under the former section but was submitted to the jury as having been drawn under the latter. Some detailing of that history seems appropriate.

Count One alleged a conspiracy to violate the federal rights of citizens, in violation of 18 U.S.C. §241 and the federally-protected rights of inhabitants of the State of New York, in violation of 18 U.S.C. §242.[31] The count alleged that it was drawn under 18 U.S.C. §§241 and 371.[32] It also set forth four overt acts allegedly committed

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31. The first problem inherent in this count thus emerged: It is obvious, of course, that one may conspire to violate more than one statute. It is difficult to understand, however, how one may conspire to violate a statute, such as 18 U.S.C. §241, which penalizes solely a conspiracy, since people are not likely to conspire to conspire. If not a contradiction in terms, the concept is at best one unknown to the criminal law.

32. Thus, the second problem created by the count became obvious. Section 241 describes a felony with a ten-year period of imprisonment as the maximum penalty; section 371, either a felony with a five-year maximum punishment or, if the conspiracy is to commit a mere misdemeanor, a misdemeanor with a one-year maximum punishment. The count thus failed to make clear whether it charged the ten-year felony, the five-year felony or the one-year misdemeanor. That problem was not solved, if ever it was, until the count was submitted to the jury.

Since the penalties were different, the count obviously charged two separate and distinct conspiracies. Thus, it should have been dismissed for duplicity, as Appellants requested that it be (T1579). The court denied the motion, finding the count "satisfactory" although "confusing" (T1579).

in furtherance of the conspiracy (or conspiracies) charged.[33]

What Count One actually charged was neither known nor deemed to be important until the time came to submit it to the jury. Then, the defects already noted and some others were the subject of discussion and argument among court and counsel (T1578-89), and the trial court, with the consent of Appellants, submitted it to the jury as an accusation that, in violation of 18 U.S.C. §371, Appellants and others had conspired to violate 18 U.S.C. §242. In order to make our point clear, however, we will treat Count One in both of its possible interpretations — charging a conspiracy under section 241 and charging a conspiracy, under section 371, to violate section 242.

1. Count One as a Conspiracy Under Section 241

If we assume, contrary to the manner in which it was submitted to the jury, that Count One charged Appellants with the conspiracy proscribed by 18 U.S.C. §241, it is

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33. Since the count, in setting forth overt acts, met a requirement of section 371 but did something unnecessary under section 241, one might guess, as Appellants argued below, that it was more likely that the grand jury intended to charge a crime under the former section.

obvious that the evidence was insufficient as a matter of law.

Section 241 penalizes conspiracies to deprive citizens of rights granted to them by the Constitution or by federal law. It was not intended to penalize a conspiracy to deprive a citizen of rights the protection of which was left to the states, such as rights under the due process clause — e.g., the right not to be deprived of property without due process of law. See, e.g.: Williams v. United States, 179 F.2d 644 (5th Cir. 1950), aff'd, 341 U.S. 70 (1951); United States v. Wheeler, 254 Fed. 611 (D. Ariz. 1918), aff'd, 254 U.S. 281 (1920); United States v. Eberhart, 127 Fed. 254 (N.D. Ga. 1899); Powe v. United States, 109 F.2d 147 (5th Cir.), cert. denied, 309 U.S. 679 (1940).

A few examples should prove our point. If section 241 penalizes any conspiracy to perform acts the result of which would be to harm a citizen's right not to be deprived of property without due process of law, then it would apply to every group of teenagers who decide to mug a citizen walking along the street, every pair of miscreants who decide to rob a liquor store and every prospective purse-snatcher who had the federal misfortune to deal with an accomplice. And it would apply to them even if they abandoned their evil

plans, since section 241 does not require even an overt act in furtherance of the plan — the mere concerted decision to so act being sufficient. Simply to state the effect of such an interpretation is to refute it, for such an interpretation would surely be "a shock to the 1870 Congress that enacted Section 241." See United States v. DeLaurentis, 491 F.2d 208, 214 (2d Cir. 1974).

We submit, therefore, that drawn under section 241 (as perhaps it was meant to be), Count One did not cover the conduct supposedly penalized by it.

2. Count One as a Conspiracy To Violate Section 242

If, as it was submitted to the jury, Count One charged a conspiracy, under section 371, to violate section 242, then the Government's evidence in support of it was nevertheless still insufficient, for the reasons set forth below in dealing with the insufficiency of the evidence under Counts Two through Four — the substantive counts.

B. Sufficiency Under the Substantive Counts

To state that Appellants' purpose in doing what the verdict found they did was other than the simple one

of making money is to ignore the record and defy common sense. Nowhere does the record even hint at such anti-federal attitudes as preventing a vote or a protest march — the typical situations for which section 242 has been invoked. In no way does a common-sense reading of the record justify anything other than a conclusion that Appellants' intent was to make money by virtue of the opportunities afforded them by their position as police officers who came into contact with major drug-peddlers.[34]

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34. Our research has disclosed but a single appellate case under section 242 where the defendants were charged with having used their "color of office" to gain money. In Brown v. United States, 204 F.2d 247 (6th Cir. 1953), a law-enforcement officer cooperated with others in extorting money from the victims by arresting and imprisoning them illegally. In all other cases, it was clear that the defendants had acted solely because the victim was about to exercise or had exercised the right protected by federal law, and that the purpose of the accused was to inflict punishment because of that fact — not to gain money. The very paucity of similar cases brought under a century-old statute suggests that the statute is inapplicable. As the Supreme Court stated in United States v. Enmans, 410 U.S. 396, 410 (1973), when denying, under analagous circumstances, the applicability of a federal statute:

> It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved.

Present here were merely offenses under the New York Penal Law committed by police officers — either larceny or bribe receiving. Under Count Two, for example, the record shows that it was Romero who asked the arresting officers what it would take to end the problem, and it may therefore be that, in that instance, the state crime committed by Appellants was bribe receiving. The label of the crime, however, makes little difference. Under Counts Three and Four, what Appellants did was confiscate, and share personally, a portion of the sums of money properly seizable as evidence of the drug offenses which Solomon and Mirabile had committed.[35]

The status of the money taken also shows, we submit, that no violations of the Civil Rights Act occurred here. The money which Appellatns took and kept for their own use was clearly the proceeds of the sales of narcotic drugs. As such, it was clearly contraband. See, e.g., Sullivan v. Grupposo, 77 Misc. 2d 833 (Civ. Ct. 1974). And contraband, we submit, is not the "property" of those who may possess it. Indeed, this Court recently excluded contraband from items of property as to which certain claimants before it

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35. The money received from Romero was likewise evidence of drug offenses.

were being denied their due process rights under the Fifth and Fourteenth Amendments by Police Property Clerk of the City of New York. See McClendon v. Rosetti, 460 F.2d 111 (2d Cir. 1972). If contraband was not protectible under 28 U.S.C. §1343(3) and 42 U.S.C. §1983 and the Due Process Clause in McClendon, it is difficult to understand why or how it is protected under 18 U.S.C. §§241 and 242 and that same Clause here. If the money taken truly was the "property" of anyone, it was New York State, to which the sums were forfeit. Appellants did not violate the drug dealers' Fourteenth Amendment rights by seizing that contraband for their own use.

In United States v. Guest, 383 U.S. 745, 760 (1966), the Supreme Court, although dealing with section 241, stated thusly the point we are making:

> This does not mean, of course, that every criminal conspiracy affecting an individual's right of free interstate passage is within the sanction of 18 U.S.C. §241. A specific intent to interfere with the federal right must be proved, and at a trial the defendants are entitled to a jury instruction phrased in those terms. Screws v. United States, 325 U.S. 91, 106-107. Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate §241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his

> exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Here, we submit, Appellants' conduct was not shown to have been motivated by a specific intent to deprive persons of their federal rights. That their conduct, motivated by personal profit, incidentally had that effect does not, as the Guest rationale shows, place them within the proscription of section 242.[36]

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36. The Final Report of the National Commission on Reform of Federal Criminal Laws (1971) states, at 155-56, when discussing its revision of sections 241 and 242:

> "Willfully" in present §242 has been changed . . . to "intentionally" in Code §1502 to adopt the culpability requirement in Screws v. United States, 325 U.S. 91 (1945), that there be shown a specific intent to deprive the victim of his federal rights, not merely, for example, to beat or murder him.

POINT TWO

COUNTS TWO THROUGH FOUR FAIL TO STATE A CRIME AND SHOULD THEREFORE HAVE BEEN DISMISSED[37]

I INTRODUCTION

Each of Counts Two through Four is drawn under 18 U.S.C. §242, which provides, in pertinent part, as follows:

> Whoever, under color of any law, . . . wilfully subjects any inhabitant of any State . . . to the deprivation of any rights . . . secured or protected by the Constitution or the laws of the United States . . . shall be [guilty of a misdemeanor].

The three counts drawn under this statute took the following general form:

> On or about . . . [a given period of time], within the Eastern District of New York, . . . the defendants, acting under color of law, wilfully, knowingly and unlawfully, did take . . . [a sum of money from the victim or victims], thereby depriving said . . . [person or persons]

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37. A motion requesting such relief was denied at the close of the Government's case (T1513).

> of a right secured and protected by the Fifth and Fourteenth Amendments to the Constitution of the United States, namely, the right not to be deprived of property without due process of law.

Having taken that form, each failed to state a crime since each failed to allege an essential element of the crime ostensibly charged — that the purpose of the conduct was to deprive the individuals involved of their federallly-protected rights.

II ARGUMENT

There can be no doubt that the essence of 18 U.S.C. §242 is a specific purpose or intent on the part of the actors to deprive those against whom they act of their federal rights. See, e.g., United States v. Ramey, 336 F.2d 512 (4th Cir. 1964), cert. denied, 379 U.S. 972 (1965). Since that is an essential element of the crime, it must be alleged in any count which attempts to charge it. None of Counts Two through Four does.

All that each of these counts does is to allege certain wilful conduct on the part of appellants, acting under color of law, and then to allege that that conduct

resulted in the deprivation of federally-protected rights belonging to persons against whom they acted. That is surely not enough.

Federal cases interpreting this section and section 241 make it clear that not only must the conduct which deprives an inhabitant of a federally-protected right be wilful, but the deprivation of that right must be wilful, in the sense that it was a predominant purpose of the conduct. For example:

In Pullen v. United States, 164 F.2d 756 (5th Cir. 1947), the Fifth Circuit emphasized the fact that mere wilfulness of conduct was not sufficient under section 242, but that there had to be also a specific intent to deprive the victim of a federally-protected right — the very element of the crime which the counts here failed to allege.[38]

In United States v. Cruikshank, 92 U.S. 542, 556-59 (1876), a case decided under the predecessor statute to

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38. As the Supreme Court noted in United States v. Guest, 383 U.S. 745, 760 (1966), a case interpreting section 241, the robbing of an interstate traveller is not, in itself, a federal crime, even though the right of interstate travel thus frustrated is a federally-protected right. There must be a concomitant specific intent on the part of the accused to deprive the victim of that very right. We submit that since that intent is the essence of the crime — what changes a state crime to a federal crime — it must clearly and specifically be alleged in any federal indictment.

section 241, the Supreme Court stated that any indictment drawn under the statute must specifically allege that it was the intent of the accused to hinder or prevent the enjoyment of the federal right which their conduct frustrated.

In Wilkins v. United States, 376 F.2d 552, 562 (5th Cir.), cert. denied, 389 U.S. 964 (1967) — another case decided under section 241 — the Circuit stated, as we state here, that an indictment drawn under the Civil Rights Act must, if it is to be sufficient, allege a specific intent to interfere with a federal right. It would be insufficient, said the court, to charge such an intent only inferentially; it must be charged positively.

To illustrate further the point we make, we set forth here the actual allegations in indictments which, when attacked on grounds of insufficiency, have been sustained by federal courts.

In United States v. Jackson, 235 F.2d 925 (8th Cir. 1956), the Eighth Circuit sustained the sufficiency of an indictment drawn under section 242 which alleged that the defendant, while acting under color of law as a prison guard had wilfully beaten a certain prisoner for the wilful purpose of administering illegal summary punishment and

with the intent to deprive that prisoner of certain specified federal rights. Thus, the indictment — as this one did not — alleged not only that the conduct was wilful but that there was an illegal wilful purpose and an illegal specific intent.

In United States v. Jones, 207 F.2d 785 (5th Cir. 1953), an information drawn under this section and attacked for insufficiency, was sustained by the Fifth Circuit since it alleged that the state officer who had assaulted the prisoner-victim for having escaped, did so for the wilful purpose and with the intent to inflict summary punishment on the prisoner and to deprive him of certain of his federal rights.

In United States v. Sutherland, 37 F. Supp. 344 (D. Ga. 1940), an indictment drawn under this section was upheld when it alleged that the state officer's wilful beating of a suspect was for the purpose of extorting from him a confession of crime.

We submit that what sustained these charges was the fact, absent here, that they specifically and expressly charged an essential jurisdictional fact — that the conduct wilfully performed (as almost all conduct is) was performed

for the specific purpose or with the specific intent which changed the criminal conduct charged from a state offense to a federal one. Here there was no such allegation and the counts involved therefore stated no federal crime. See the general test for the sufficiency of an indictment set forth in Russell v. United States, 369 U.S. 749 (1962). On that ground, it was error for the trial court to have denied Appellants' motion to dismiss them.

POINT THREE

THE INSTRUCTIONS ON COUNTS TWO THROUGH FOUR FAILED TO INFORM THE JURY OF THE GOVERNMENT'S BURDEN OF PROVING THAT APPELLANTS ACTED WITH THE SPECIFIC INTENT OF DEPRIVING PERSONS OF FEDERALLY-PROTECTED RIGHTS

I INTRODUCTION

We have already argued, in Point Two, supra, that Counts Two through Four failed to state a crime and should therefore have been dismissed. Here we argue that even if it could be said that those counts were technically sufficient, the trial court's charge explaining them allowed the jury to convict Appellants in the absence of the required proof that their specific intent was to deprive persons of their federally-protected rights.

II ARGUMENT[39]

It is clear that no defendant may be lawfully convicted of a violation of 18 U.S.C. §242 unless the Government proves, beyond a reasonable doubt, that by his wilful conduct

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39. We adopt here the reasoning of the authorities cited in Point Two, supra.

he specifically intended to interfere with his victim's federally-protected rights. See, e.g.: United States v. Guest, 383 U.S. 745 (1966); Clark v. United States, 193 F.2d 294 (5th Cir. 1951); Wilkins v. United States, 376 F.2d 522 (5th Cir.), cert. denied, 389 U.S. 964 (1967).

The trial court, in explaining to the jury what kind of proof under these counts was essential to justify a conviction, failed to set the required standard. It stated (A213a):

> If you find that the defendant knew what he was doing and that he intended to do what he was doing, and if you further find that what he did constituted a deprivation of a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victims of that constitutional right.

An exception to this charge (A230a-31a) failed to cause its correction. Reversible error was thereby committed.

Under this charge, it was most reasonable for the jury to have believed that if Appellants had wilfully taken money from Romero, Solomon and Mirabile, and that if the result of that conduct had been the deprivation of the federally-protected right not to have one's property taken

without due process of law, then they could be found guilty of violating 18 U.S.C. §242. Such a belief, though reasonable under the charge, would be totally erroneous. The verdicts under those three counts should therefore not be permitted to stand.

POINT FOUR

THE EVIDENCE UNDER COUNT ONE DID NOT SHOW A SINGLE CONTINUING CONSPIRACY, BUT RATHER A SERIES OF SEPARATE CONSPIRACIES, AND THE COUNT SHOULD THEREFORE HAVE BEEN DISMISSED. FURTHERMORE, THE EVIDENCE IMPROPERLY ADMITTED UNDER THE SINGLE-CONSPIRACY THEORY SERIOUSLY PREJUDICED APPELLANTS' RIGHT TO A FAIR TRIAL

In its charge to the jury, the trial court quite properly stated (A205a):

> A single conspiracy over a number of years is charged — not a series of individual conspiracies. You need not find that the conspiracy covered all theyears in question but it must be more than a series of independent discrete agreements.

We submit that the Government's own evidence negates the single-conspiracy theory and shows instead "a series of independent discrete agreements."

We make no claim, of course, that the evidence with respect to each individual seizure of money from a drug dealer did not show an agreement among Appellants and others to make those seizures. As to those separate incidents, there was evidence of a conspiracy with the particular drug dealer and his loot as its objects.[40] We do claim,

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40. In so stating, we do not waive our position that 18 U.S.C. §§240-41 were never intended to cover the type of conduct alleged here. See our Point One, supra.

however, that — as the conspiracy concept has heretofore been understood — there was no overall continuing conspiracy shown in this case.

We start, in analyzing the facts, with the Tange-McClean restaurant meeting in the summer of 1969. The evidence fairly suggests that Tange was aware that illegal money was being made by S.I.U. agents, and that he wished, as he had told Sergeant Horgan, to share in it. Tange described his conversation with McClean as follows (T1374):

> During this time I had a conversation with Detective McClean where I asked him if I could be included in as an equal partner in any illegal money that would be made by him, by his team.[41]
>
> And at that time he agreed to — to go along with this; said I would be included in as an equal partner. And he said to me that the team does not make a lot of scores; they are very careful, only looking for an occasional score where they would make money; and they would be very careful and touch all bases and make sure that everything was covered; and that they would not look to make a lot of money.

During this conversation, there was no discussion of the names or identities of the drug dealers upon whom "scores"

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41. We note again that Codelia was not a member of the McClean - Viera team at this time.

would be made, no reference to the places, either inside or outside the Eastern District, where they would be made, no specification of the amounts that would be made, and no detailing of the times when the "scores" would occur.

Common sense tells us that what happened at that meeting was that McClean told Tange that, from time to time, he team would come upon a situation where a "score" could be made. When that situation occurred, the members of the team would decide whether to seize money — a decision which depended upon the particular circumstances of the case. The team members had obviously expressed among themselves a willingness to agree in the future to do wrong when the particular facts of the case suggested that they might safely do so. That, we submit, is a far cry from a punishable conspiracy.

This "agreement" to consider agreeing in the future is what the Government used as the basis of its conspiracy charge. The conspiracy concept has some elasticity, it is true, but to stretch it this far is to penalize merely an evil inclination and thus cause the concept to break. There was no specific identifiable victim of the "conspiracy," no specific case in which it would be carried out, no specific sum of money to be seized. Thus, we submit, there was no continuing conspiracy.

One example, among many that could be given, should prove our point. Assume that Smith and Jones are law partners engaged largely in the practice of criminal law. They know that, from time to time, they will be involved in cases where corrupt police officers or corruptible witnesses will be involved. They have a conference one day and, reviewing these anticipated and inevitable facts, agree that each is willing to keep an eye out for such a case where they could obtain an additional fee from a wealthy client by guaranteeing an acquittal through the means of bribing a policeman or a crucial witness to change his testimony. Forgetting for the moment the requirement of an overt act,[42] can anyreasonable argument be made that those lawyers, however evilly inclined, are conspirators by virtue of that conference? When they find the case they are looking for and agree to offer the bribe, they will surely become conspirators; but not, we submit, until then.

We submit that Count One, charging a single continuing conspiracy, was not supported by the evidence and should therefore have been dismissed. Moreover and equally as important, the inclusion of this improper count gravely

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42. It is perhaps of some significance that the only overt acts set forth in furtherance of this "conspiracy" were the substantive crimes charged in Counts Two through Four.

prejudiced Appellants in other areas of the case and should result in a reversal of the convictions on the other counts. It was the single-conspiracy theory, for example, which, in large part, caused the trial court, over defense objection, to permit the introduction of testimony concerning: (1) the Calvo matter; (2) the Tange-Horgan conversation; (3) the Tange-McClean conversation; (4) the restaurant meeting at which Tange and Codelia were present; and (5) the two $500 to $1,000 payments to Tange by Codelia and Wolfe. In the absence of this theory, those items of evidence would have been justifiable, if at all, solely on the "other crimes" theory, with all its limitations. Those limitations, we submit, would have required the exclusion of much, if not all, of this proof and would have seriously, if not fatally, weakened the Government's case.[43]

We submit, therefore, that the evidence failed to justify the verdict under Count One and that Appellants were grievously prejudiced by the evidence introduced in support of that count.

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43. We note as an exmple the acquittal of all Appellants on Count Six — the Grimke-Mirabile wiretap matter — despite the detailed testimony of Martinez. That acquittal is explainable solely by the jury's reluctance to convict solely on the word of that witness. If the "other crimes" testimony referred to had been excluded, the jury may well have chosen not to believe those upon whose testimony the verdict rested.

POINT FIVE

COUNTS FIVE THROUGH SEVEN LACKED THE SPECIFICITY REQUIRED BY RULE 7(c) AND SHOULD THEREFORE HAVE BEEN DISMISSED

Counts Five through Seven, drawn under 18 U.S.C. §2511(1)(a), should have been dismissed under Rule 12 because of a lack of specificity which caused them to run afoul of Rule 7(c).

First, each count alleged that Appellants "unlawfully" conducted a wiretap, but was devoid of information as to the nature of the illegality. Chapter 119 of Title 18, in which section 2511(1)(a) is to be found, contains numerous ways in which a wiretap may be an illegal one. There may be no court order for it; the order may be defective, either by its terms or because there was insufficient probable cause for its issuance, or because it was sought by an unauthorized person; a valid order may be executed improperly and thus become illegal; etc. We submit that when a statute describes numerous specific ways in which it may be violated, a count drawn under it which does not specify the manner in which it was violated is defective and must therefore be dismissed. See Russell v. United States, 369 U.S. 749, 765 (1962), where the Supreme Court

quoted with approval the following words from United States v. Cruikshank, 92 U.S. 542, 558 (1876):

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it shall not be sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — it must descend to particulars."

The Court in Russell, supra at 765, also quoted with approval its words in United States v. Carll, 105 U.S. 611, 612 (1882):

> In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished . . . .

Here, all that Appellants were advised by these counts was that a wiretap which they had installed was illegal. They were never told in what way the installation was illegal, although the statute itself, and the cases which have construed it, show that there are numerous specific means of illegality. In short, the counts failed to "descend to

particulars," and were thus fatally defective.[44] See also: United States v. Seeger, 303 F.2d 478 (2d Cir. 1962) (essential facts, not "legal conclusions," must be set forth); United States v. Levinson, 405 F.2d 971, 977 (6th Cir. 1968), cert. denied, 395 U.S. 958 (1969) (indictment must allege manner in which violation occurred and essential factual allegations in support thereof).

Second, each count alleged merely that a telephone at a given address was wiretapped; it did not give the number of the tapped phone, nor did it identify the person in whose name the tapped phone was registered. Since the address stated may have contained numerous telephones, Appellants were not protected, by those charges, from a later indictment for tapping another phone at the same address. Thus, the counts were defective and should have been dismissed on this ground as well. See, e.g., Russell v. United States, supra.

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44. Indeed, the counts did not even allege that appellants knew of the illegality, only that they knew of the interception. It is clear, we submit, that police officers may conduct a wiretap which is illegal without knowing that it is illegal. Even this possibility was not precluded by the tenor of the accusations.

POINT SIX

COUNTS ONE, TWO AND FIVE SHOULD HAVE BEEN DISMISSED PURSUANT TO THE EASTERN DISTRICT PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES

I INTRODUCTION

As we have already mentioned, Counts One, Two and Five of the indictment upon which Appellants were convicted alleged facts which had previously been charged in the first indictment. That indictment had been filed more than eight months, and dismissed on the Government's motion more than six months, before the present indictment.

When the first indictment was filed, there existed, in the Eastern District, a Plan for Achieving Prompt Disposition of Criminal Cases. Rule 4 of that Plan read as follows:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at

> least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

We submit that, in this case, the Government violated Rule 4 and that Counts One, Two and Five of the indictment should therefore have been dismissed.

II ARGUMENT

The present indictment was a successor to an earlier indictment, filed on March 8, 1974, and later dismissed on the Government's own motion, without any explanation being offered by it for its unwillingness to pursue those first charges.[45]

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45. A reading of that first indictment shows that it was largely drawn under 18 U.S.C. §§3 and 1510, insofar as Counts One and Two of the present indictment are concerned. We submit that the counts drawn under those sections failed to state crimes against the United States, and would have been dismissed on motion, and suggest that that explains the Government's unwillingness to pursue that indictment.

We submit that if Rule 4 is to have any meaning and effect at all, the period immediately following the dismissal of the first indictment should have been considered in determining whether the Government had been guilty of neglecting the prosecution of what later became Counts One, Two and Five. Otherwise, after a delay of almost six months, the Government could, on its own motion, cause an indictment to be dismissed and then cause a new one to be handed down, covering the same conduct but employing a different statute. Such a possibility was hardly contemplated by the Rule. The Government, having delayed the prosecution of Counts One, Two and Five for more than six months, should have been required to suffer the consequences that the Rule imposes upon such inaction.

We recognize that similar reasoning was rejected by this Court in United States v. Flores, 501 F.2d 1356, 1359-60 (2d Cir. 1974), but we ask that the rationale of that case be reconsidered. Moreover, the Flores rationale does not appear applicable to the peculiar facts of this case. There, this Court stated at 1359-60:

> The Government contends, and we accept, that for the period after the dismissal of the complaint against appellant and prior to appellant's indictment the clock should not run

> against it. During this period appellant was not subject to any of the disabilities associated with being under arrest, the subject of a complaint or indictment, or in the midst of a criminal prosecution.

Here, however, the original indictment was well publicized and, as might be expected, the dismissal was not. Appellants remained under a cloud for the entire period between the dismissal of the first indictment and the handing down of the second. We submit that those facts distinguish this case from Flores.

POINT SEVEN

THE PROSECUTOR'S FAILURE TO DISCLOSE TO THE DEFENDANT VIERA IN ADVANCE OF THE TRIAL THAT A PERSON WHO HAD BEEN REPRESENTED BY VIERA'S COUNSEL IN A RELATED PROCEEDING WAS A PROBABLE WITNESS FOR THE GOVERNMENT IMPAIRED VIERA'S SIXTH AMENDMENT RIGHT TO BE REPRESENTED BY COUNSEL OF HIS CHOICE AND WAS VIOLATIVE OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT

I INTRODUCTION

Before the trial started, Mr. Kaplan, the Assistant United States Attorney in charge of the prosecution, knew that Mrs. Calvo,[46] was a probable witness for the Government (A187a-88a). He also knew that Mr. Lazarus, Appellant Viera's counsel, had previously represented Mrs. Calvo and her since-deceased husband in the very same case concerning which she was to testify (A187a-88a). He also knew that neither Viera nor his counsel knew or had reason to believe that Mrs. Calvo was to be a witness for the Government. Nevertheless, Mr. Kaplan did not disclose this information to the Court or to counsel until one week after the trial started and after the major portion of the Government's case had been presented (A164a et seq.).

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46. The testimony she gave is summarized at page 11 supra.

Upon being apprised of the facts stated above, the trial court did what this Court has said should be done "when the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially competing interest is known to be a government witness." See United States v. Alberti, 470 F.2d 878, 881 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973). This Court said in the case cited that:

> In such circumstances, the district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views. . .

At the hearing which the trial court conducted, Mr. Lazarus, counsel for Viera, stated, among other things, as follows: that had he been informed by the Government prior to the start of the trial that Mrs. Calvo was to be a witness for the Government, he would have withdrawn from the case (A185a); that there might "in some way be some inhibitions placed on (him) in connection with this matter,

regardless of any attorney-client relationship which may be waived by Mrs. Calvo" (A186a). Mr. Lazarus further stated that he was "fond" of Mrs. Calvo because she was somebody that he saw over the course of time, a woman whom he knew had some children and had problems and he "felt for her" (A179a). It further appeared that, in addition to representing Mr. and Mrs. Calvo in the case concerning which the latter was to testify, Mr. Lazarus had represented Mr. Calvo in other matters (A185a-86a).

Asked his view as to his continued representation by Mr. Lazarus, the Appellant Viera made the following statement to the Court (A184a):

> I have a strong view regarding (Mr. Lazarus) representing me in this matter, particularly since (he) represented the person that I had arrested, represented her husband, a person who was my informant, and that I feel -- after what (Mr. Lazarus) told me as to (his) inhibitions, that I feel I could not get accurate and full representation in the courtroom. I don't believe I would have the full services of the defense attorney. I feel that the questions he would ordinarily ask of another witness, he may not ask of this . . . potential witness. I feel unhappy with the situation, and in reality, I do not know what to do now.

When the Court was first told of the Government's

intention to call Mr. Lazarus' former client as a witness, he asked Mr. Kaplan (A171a):

> Why didn't you tell Mr. Lazarus about it so he could have at least made a determination about whether he wanted to get out of the case?

Mr. Kaplan's answer to that question and the ensuing colloquy is set forth below (A171a-72a):

> MR. KAPLAN: Perhaps we should all take a look at that statement that was taken and the date of that statement,[47] which is subsequent to trial.
>
> THE COURT: What trial?
>
> MR. KAPLAN: This trial. Subsequent to the commencement of the trial.
>
> THE COURT: You've known for a month that she might be a witness.
>
> MR. KAPLAN: Judge, as you know, there are a lot of things that have happened in this case and for me to advise Mr. Lazarus of a -- to tell you the truth, there are a lot of -- there have been a lot of similar acts and a lot of possible evidence that the Government could present in this case.
>
> For us to turn over all our possible evidence to the defense is quite an unusual procedure, in light of the turnover of 3500 material prior to trial.
>
> THE COURT: I know, but this is a special situation, where a witness had

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47. The statement to which he apparently referred was the statement of Mrs. Calvo dated April 1, 1975 (T1232), which preceded by two days the impanelling of the jury.

> been represented by counsel and counsel might have elected to consult with the client and determine whether he wanted to continue in the case.

On the basis of the facts stated above, counsel for Viera made a motion for a severance and a mistrial (A165a, A168a). Those motions were denied by the Court subject to the following conditions (A189a):

> This witness, before she testifies must state that she waives completely her attorney-client privilege vis-a-vis Mr. Lazarus; and that she understands, and gives him full permission to cross-examine vigorously, and to use any information he may have obtained during the course of his representation of her and of her husband.[48]

The Court further told Viera that if he wished to discharge his attorney and did not have the financial means to employ one himself, the Court would appoint one without cost to Mr. Viera (A191a). This offer was declined by Viera (ibid).

In ruling as he did on Viera's motion for severance and mistrial, the Court stated that under the conditions that he had imposed (as set forth above):

> . . . I find that there is no possible prejudice, even remote. There is no practical reason why this

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48. Mrs. Calvo could, of course, have waived her own attorney-client privilege, although she could hardly have ended the loyalty which, by his own admission, her prior counsel still felt toward her. We are at a loss to understand, however, how she could have waived her deceased husband's privilege.

> defendant should at all be disadvantaged. There is no ethical reason why this lawyer should not use all the information he obtained, aggressively and fully. There is no reason in any of the cases -- I won't cite them, but there are many of them in the Second Circuit -- And there is no reason under the Code of Professional Responsibility why he should be inhibited.
>
> In point of fact, this defendant can only be advantaged by these circumstances. (A189a)

Despite the foregoing, Mr. Lazarus did not ask the witness a single question on cross-examination (T1505) nor did he mention the witness' testimony during the course of his summation.

Thus, whatever advantages Viera might have derived from his lawyer's prior representation of the witness were not realized. Not only did his lawyer not cross-examine the witness "aggressively and fully," he did not examine her at all.

II ARGUMENT

Viera first contends that, when Mr. Kaplan became aware, before the trial: (a) that Mrs. Calvo might be called to testify as a Government witness concerning events which allegedly had occurred at the time she and her late husband

had been arrested by Viera and McClean; and (b) that Mr. Lazarus, Viera's lawyer, had represented the witness and her husband on the indictment which resulted from that arrest, it was Mr. Kaplan's duty, both as an officer of the Court and a representative of the Government, to bring the facts to the trial court's attention immediately.

It is respectfully submitted that Mr. Kaplan's duty to act as indicated above was clear. Since the Alberti case cited above was a 2d Circuit case which arose in the Eastern District as recently as 1972, an Assistant United States Attorney in that District is chargeable with knowledge that "when the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially conflicting interest is known to be a Government witness . . . . the district judge should conduct a hearing to determine whether there exists a conflict of interest," etc. And Mr. Kaplan was further chargeable with knowledge that, among other things, the trial court is required to "see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views . . . ." (470 F.2d at 881).

It is too obvious to require argument that when a

lawyer, any lawyer, knows of the existence of facts which, if known to the court would require the latter to discharge certain duties, that lawyer, as an officer of the court, has the duty of disclosing those facts to the court. And, a fortiori, if the lawyer is the representative of the United States Government in a criminal prosecution, his duty to make such disclosure is even more obvious.

The duty of the Government to disclose to the court a potential conflict of interest of the kind here involved is understood and recognized at least by the United States Attorney for the Southern District of New York. This past May, in the case of United States v. Peter Daly, 74 Cr. 229, the United States Attorney advised District Court Judge Wyatt that the lawyer for the defendant had previously represented one or more witnesses for the Government and that a potential conflict of interest existed. As a result, Judge Wyatt, at the request of the Government, conducted an inquiry and the lawyer for the defendant withdrew as trial counsel and new counsel (Viera's attorney on this appeal) was substituted.

In another case in the Southern District (United States v. Bravo, et al., 75 Cr. 429), the United States Attorney successfully moved before District Court Judge Cannella to disqualify a lawyer from representing a defendant

because, among other things, "a member or members of the firm have previously represented three prospective Government witnesses in cases in which these witnesses were criminal defendants." (See Memorandum Decision of Judge Cannella dated August 29, 1975.) Whether or not this Court, which is scheduled to hear an appeal from Judge Cannella's order on September 29th (75-1329), will affirm or reverse, is unimportant here because the factual situation is substantially different. The point is, however, that when the Government's representatives wish to oust a defendant's counsel because of a potential conflict, they know that they must bring the matter to the court's attention, not after the trial has begun but before.

If it is the Government which decides whether it will apprise the court before or after the trial has begun that a potential conflict exists, then, in effect, it is the Government, not the trial court, not the defendant, not the defendant's counsel who is making the ultimate decision as to who shall represent the defendant. Such a result is patently intolerable.

This Court has held in United States v. Sheiner, 410 F.2d 337, 342 (1967) that:

> . . . . defendants who retain counsel have a right of constitutional dimensions

> to representation by counsel of their own choice . . . . that choice should not unnecessarily be obstructed by the court.

It is submitted that, if the trial court in the case at bar had known before the trial started what he was subsequently told by Mr. Kaplan concerning Mrs. Calvo and Mr. Lazarus' representation of her and her husband, and the court had not disclosed that information to Viera and his counsel before the trial started, it would constitute a substantial impairment and obstruction of Viera's constitutional right to representation by counsel of his choice. Giving Viera the right to bring in new counsel to represent him after the trial had started and the Government's case was nearly all in, was hardly an adequate substitute for offering that choice to Viera before the trial started.

And, if it would have been improper and a violation of Viera's constitutional rights for the trial court to withhold that information from Viera before the trial started, is it any less improper or violative of Viera's constitutional rights for the prosecutor to withhold that information?

It may be anticipated that the Government will argue that, even if Mr. Kaplan should have made his disclosures concerning Mrs. Calvo before the trial started, the

error should be overlooked because, it will be claimed, Viera was not prejudiced thereby. In connection with this argument, the Government will undoubtedly rely on the following excerpt from the opinion of this Court in Alberti supra, wherein, citing United States v. Lovano, 420 F.2d 769 (2d Cir. 1970), it was said (470 F.2d at 881) as follows:

> The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from the joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel.

Such an argument by the Government misconceives the thrust of Viera's argument. He contends that the due process right of a defendant to "be afforded a fair opportunity to secure counsel of his own choice" (see Powell v. Alabama, 287 U.S. 45, 83 (1932); Chandler v. Fretag, 348 U.S. 3 (1954); Crooker v. California, 357 U.S. 433, 439) is so fundamental that any impairment or obstruction of that right is ipso facto prejudicial.

In the last term the Supreme Court held in Faretta v. California (421 U.S. _____, decided June 30, 1975) that a criminal defendant in a state court proceeding has the due

process right to waive the assistance of counsel and proceed pro se. The denial of that right was held by the court to be so serious as to require reversal. In so holding, the court did not require the defendant to show that he could have tried a better case for himself than the lawyer appointed by the court to represent him. The Supreme Court held that the defendant had the absolute right to represent himself, despite the trial judge's finding that he was not competent to do so.

The holding in Faretta implies that the Sixth Amendment guarantees a defendant a right to retain counsel of his choice. It may be further inferred therefrom that any impairment or obstruction of that right violates not only the Sixth Amendment but the due process clause in the Fifth Amendment.

One of the cases relied upon by the trial judge in support of his denial of Viera's motion for a severance and a mistrial was United States v. Bynum, 485 F.2d 490 (2d Cir. 1973). In that case, this Court rejected the claim of the appellant that he had been denied the effective assistance of trial counsel because he at one time had represented a Government witness. The factors which the Court deemed material in reaching its decision were:

(a) The defendant knew "at the beginning of the

trial" that his counsel had previously represented the prospective Government witness.

(b) Although represented by two attorneys, no request was made for a hearing on the question "until after the trial, and then on the basis of newly discovered evidence."

(c) The representation of the witness by defendant's counsel was "in a totally unrelated matter, an assault charge in a state court."

(d) There was no prejudice in any event since the Government witness in question had been acquitted in the case in which defendant's counsel had represented him and any avenue on cross-examination of this point would have been fruitless.

(e) The court below found that defendant's trial counsel had represented him in an extremely competent manner.

In the case at bar, however, none of the factors listed above as being present and material in Bynum were present. Here (a) Viera did not know at the beginning of the trial that his counsel had represented a probable Government witness; (b) Viera had no opportunity before the trial started to have a hearing on the possible conflict, nor was he given a chance to decide whether he wished to dispense with

the services of his then attorney; (c) the representation of Mrs. Calvo by Viera's attorney was in the very same matter concerning which she was to testify; (d) Mrs. Calvo was not acquitted of the charge, she pleaded guilty; (e) the trial judge here made no finding as to whether Viera's attorney had represented him in a competent manner; he could not have made such a finding with respect to Mr. Lazarus' handling of the witness Calvo because, as shown above, he did not cross-examine her, or refer to her testimony in his summation.

In light of the foregoing, it is submitted:

(a) that Viera's constitutional right to have a "fair opportunity to secure counsel of his choice" was substantially impaired and obstructed by the Government's failure to disclose in advance of the trial that a probable witness for it had been represented by Viera's counsel in a related proceeding;

(b) that the right of a defendant in a criminal case to secure counsel of his choice is so fundamental that any substnatial impairment or obstruction of it requires reversal with or without a showing of prejudice;

(c) In the case at bar prejudice has been shown or may be inferred from the inactivity of Viera's counsel relative to the witness Calvo.

For all of which reasons, the judgment of conviction

as to Viera should be reversed. Additionally, the prejudice to Viera caused prejudice to his co-defendants. When the issue arose, Mr. Lazarus made it clear that neither Mr. nor Mrs. Calvo had complained to him about the taking of any money by McClean and Viera. Counsel for Codelia told the court that he might have to call Mr. Lazarus to prove the absence of a fresh complaint on this matter (A169a). The trial court, knowing that Mr. Lazarus had already imparted that information, stated "I am not going to allow you to call him for a no good reason," to which counsel replied "It ought to be brought out in some way" (A170a). It never was, and the jury never learned that neither of the Calvos had made any statement about this incident to their own lawyer, Mr. Lazarus. Had Mr. Lazarus not been involved in the case, he would have been available as a witness for all Appellants on this significant fact — a fact which may very well have seriously affected the credibility of a woman whose testimony was received against all Appellants.

POINT EIGHT

THE EVIDENCE UNDER COUNT FIVE WAS INSUFFICIENT AS TO APPELLANT VIERA

Viera, as we have already noted, was not named as a defendant in Count Seven, which charged illegal wiretapping in the Sparza-Lindquist matter. And, like McClean and Viera, he was acquitted of wiretapping under Count Six, the Grimke-Mirabile matter. He was convicted, however, of illegal wiretapping under Count Five, which dealt with the Romero case. We submit that the evidence under that count, as to him, was insufficient.

The sole Government witness who gave testimony under Count Five was Paul Stern, the superintendent of the building where the wiretap was located. He identified, although not positively, all three Appellants and one Detective Joseph Nunziata as the four officers whom he assisted in his building. He further testified that the wiretap equipment was located in a storage room. What is significant, however, is that although he placed Nunziata, McClean and Codelia in the room containing the wiretap equipment, he testified that he had no recollection of ever having seen Viera in that room (Stern — A23a; T926). His failure to place Viera in the room, we submit, means that there is no

evidence, other than Viera's association with the other three, that Viera knew of and participated in the wiretap. Without such evidence, Viera's conviction under Count Five cannot be permitted to stand.[49]

CONCLUSION

For the foregoing reasons, this Court should issue an order reversing the judgments of conviction herein and dismissing the indictment.

Respectfully submitted,

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49. Lest it be argued that the knowledge and conduct of the others may, as a practical matter, be imputed to Viera since he must have known what they knew, we would merely point out that the Government's own case shows that Stefania, who participated in the wrongdoing alleged was completely unaware of any illegal wiretap.

Service of three ③ copies of the within
is admitted this 29th day of September 1975

U.S. Attorney for the Eastern District
Attorney for the Appellee